

1 Michael Machat, Esq.
2 MACHAT & ASSOCIATES, P.C.
3 8730 W. Sunset Blvd., Ste. 250
4 West Hollywood, California 90069
5 Telephone: (310) 860-1833
6 Telefax: (310) 860-1837
7 Email: info@machatlaw.com

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Attorneys for Plaintiff
JohannSongs – Publishing, Ltd

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DISTRICT

11 JOHANNSONGS - PUBLISHING, LTD,) CASE NO. 2:18-cv-10009-AB-SS
12)
13 Plaintiff,)
14 vs.)
15 ROLF LØVLAND, BRENDAN)
16 GRAHAM, PEERMUSIC, LTD,)
17 UNIVERSAL MUSIC PUBLISHING)
18 GROUP, WARNER MUSIC GROUP,)
19 UMG RECORDINGS, INC., APPLE,)
20 INC., SPOTIFY TECHNOLOGY S.A.)
21 and DOES 1 – 20,)
22)
23 Defendants.)
24)
25)
26)
27)
28)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Hearing Date: December 6, 2019
Time: 10:00 A.M.
Courtroom: 7B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Hon Andre Birotte Jr.

<i>TABLE OF CONTENTS</i>	PAGE
I. PRELIMINARY STATEMENT	1
II. SUMMARY OF THE FACTS	3
A. The Creation of “Soknudur” and the melodic backbone to “You Raise Me Up.”	3
B. Access to “Soknudur”	4
C. “You Raise Me Up” is released and heard by Johann Helgason	5
D. The Invention of the “Danny Boy” Defense.	6
III. LEGAL STANDARD	7
A. STANDARD OF REVIEW FOR SUMMARY JUDGMENT	7
B. Copyright Infringement: Inquiry on Motion for Summary Judgment	8
IV. ARGUMENT	10
A. The songs “Soknudur” and “You Raise Me Up” are substantially similar	10
B. Lawrence Ferrara’s expert report is fundamentally flawed and not credible.	12
C. Prior art: the Ferrara report contradicts its own	17

findings by employing inconsistent comparison criteria, with conflicting conclusions and misleading results.

D. Prior art: the Ferrara report contradicts its own findings by employing inconsistent comparison criteria, with conflicting conclusions and misleading results. 18

V. CONCLUSION 21

TABLE OF AUTHORITIES

<i>Brown Bag Software v. Symantec Corp.</i> , 960 F.2d 1465, 1472 (9th Cir. 1992)	8,9
<i>City of Pomona v. SQM N Am. Corp.</i> , 750 F.3d 1036, 1049 (9th Cir. 2014)	7
<i>Feist Publications, Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340, 361 (1991).	8
<i>Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp.</i> , 475 U.S. 574, 587-88 (1986).	7
<i>Rentmeester v. Nike</i> , 883 F. 3d 111 at 1117 (9 th Cir. 2018)	4
<i>Rice v. Fox Broadcasting Co.</i> , 330 f. 3d 1170, 1178 (9 th Cir. 2003)	4
<i>Smith v. Jackson</i> , 84 F.3d 1213, 1218 (9 th Cir. 1996).	8
<i>Swirsky v. Carey</i> , 376 F.3d 841, 845 (9 th Cir. 2004), as amended on denial of reh' ^g (Aug. 24, 2004).	8, 9

Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738
(9th Cir. 1979).

7

T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809
F.2d 626, 630- 31 (9th Cir. 1987).

7

Statutes and Other Authorities

Fed. R. Civ. P. 56a

7

Fed. R. Civ. P. 56e

7

I. PRELIMINARY STATEMENT

2 This case is a standard music copyright infringement case in which the legal
3 issues are not in dispute. The dispute concerns the most famous song and best
4 selling song in Iceland, ever, “Soknudur” which was first performed and released
5 by Iceland’s beloved artist Vilhjálmur Vilhjálmsson in June of 1977. The song
6 was played, and still is played and performed in Iceland, frequently. The
7 Norwegian defendant Rolf Lovland had access to the song in his native Norway,
8 and in Iceland where he came to record two albums in the mid 1990s. He also had
9 access to the song at the Eurovision Song Contest in Zagreb, in 1990. Rolf
10 Lovland first released the derivative song “You Raise Me Up” in 2001 with his
11 band Secret Garden. A couple of years later, Josh Groban recorded his version of
12 “You Raise Me Up” and had an international smash hit. Both songs still get
13 constant airplay, although “Soknudur” primarily is played in Iceland and “You
14 Raise Me Up” is played throughout the world.

15 To prove copyright infringement for a song, first a plaintiff has to have a
16 valid copyright, and the plaintiff must prove a substantial similarity. The greater
17 the access to a song, the lower the showing of substantial similarity is required.

18 Defendants have brought a motion for summary judgment at this early
19 juncture of the case based upon their over zealous expert's report that has taken a
20 position so much to the extreme that it damages his credibility as to all that he says.
21 One of the defenses to copyright infringement is prior use. Rather than accede to
22 the obvious, that there is similarity, he takes the extreme position that there is not
23 any similarity, and only three notes are the same. To reach that conclusion he
24 ignores basic principals of comparing songs, concentrating on distinctions that
25 make no difference while ignoring the underlying melodies of the two songs in
26 dispute.

27 Then when he discusses the prior art argument, he flips and adopts

1 extremely loose criteria that is inconsistent with the criteria he used in arguing the
2 songs are not similar.

3 Plaintiff engaged musicologist Judith Finell to prepare her own report. Her
4 initial report in which she finds “Soknudur” and “You Raise Me Up” to be
5 substantially similar was of course expected. The Icelandic Performing Rights
6 Society, STEF had also engaged two musicologists who likewise determined
7 extensive similarity. When threatened with legal action in the past in Europe,
8 defendants presented the Danny Boy defense, arguing that any similarities in the
9 two songs also existed in Danny Boy. Owing to a lack of funding, an action in
10 Europe was not previously brought. But during the intervening years, no one has
11 ever seriously said the songs are not similar. Instead the only dispute revolved
12 around Danny Boy.

13 Judith Finell has opined that there are more similarities between “Soknudur”
14 and “You Raise Me Up” than there are with any of them and Danny Boy. She had
15 the same opinion with respect to the other prior art songs brought up by defendants.
16 Plaintiff has a bona-fide copyright infringement case ready to go to a jury. There is
17 no reasonable dispute as to substantial similarity, and any dispute with regards to
18 Danny Boy defense should be brought before a jury. Defendants’ expert sacrificed
19 his credibility by arguing a lack of similarity between the songs and in employing a
20 flawed methodology. Meanwhile, Judith Finell acknowledges similarities in
21 the prior art but states “You Raise Me Up” is closer to “Soknudur” than either of
22 them are to Danny Boy or any other prior art. Plaintiff’s expert’s reports are
23 credible. Defendant’s expert report is too far fetched to be believed. Thus
24 Defendants’ motion should be denied.

II. SUMMARY OF THE FACTS

A. The Creation of “Soknudur” and the melodic backbone to “You Raise Me Up.”

5 In July of 1976, Vilhjalmur Vilhjalmsson, one of Iceland's most beloved
6 singers at the time before dying in a tragic car accident, began an album project that
7 took place at Studio Hljooriti. The album that resulted was entitled *Hana nu*. One
8 of the songs recorded in those demo session was *Soknudur*¹. The words were
9 written by Vilhjalmur Vilhjalmsson and the music was composed by Johann
10 Helgason. (Declaration of Johann Helgason ¶3 The demos were recorded in July
11 1976, and the actual recordings began on December 7, 1976. The album was
12 released in 1977. In September of 2018, Johann Helgason transferred his rights in
13 "Soknudur" to Plaintiff, Johannsongs-Publishing, LTD, a company owned by him.
14 A copyright registration for "Soknudur" was granted in August of 2019.
15 The application was filed prior to filing suit. (Machat Decl ¶2 and Ex.1)

16 “Soknudur” became a big hit, and after the tragic death of Vilhjalmur
17 Vilhjalmsson, it was rerecorded numerous times by various singers and it was also
18 rerecorded with vocals. In fact there are 47 versions of Sokndur that have been
19 published (Helgason Decl ¶9 and Ex.2) including one in Denmark. It has been
20 distributed in Scandinavian countries. It would be fair to say it has not had an
21 extremely high profile outside of Iceland but it has made its way into the
22 consciousness of those other Scandinavian countries. It is often played at funerals,
23 memorial services and the like. It is an “evergreen” song in Iceland as it remains
24 extremely well-known and frequently played some 40 years after it was first
25 released (Helgason Decl ¶¶ 9-12 and Exhibits 8, 9 and 10)

¹ The Icelandic spelling of Soknudur 3 is Söknuður

B. Access to “Soknudur”

Although defendants have chosen to ignore and concede access in its motion for summary judgment, it still remains relevant to the Court's analysis of the case because as stated in the case law of copyright infringement, proof of direct copying is rare. So instead, in addition to proving two works are substantially similar a copyright plaintiff has to prove access as well.

When a high degree of access is shown, a lower amount of similarity is needed to prove copying. *Rice v. Fox Broadcasting Co.*, 330 F. 3d 1170, 1178 (9th Cir. 2003) (citations omitted). “To prove copying, the similarities between the two works need not be extensive, and they need not involve protected elements of the plaintiff’s work. They just need to be similarities one would not expect to arise if the two works had been created independently.” *Rentmeester v. Nike*, 883 F. 3d 111 at 1117 (9th Cir. 2018)

In this case, Rolf Lovland recorded two albums in Reykavik, Iceland at Studio Syrland. Preproduction began in January 1995. We know this based upon statements by the recording engineer who worked on the albums with Rolf Lovland and based upon excerpt from Mr. Lovland's book.

We also know that Soknudur was already an evergreen classic hit at the time Rolf Lovland recorded his albums in Iceland. We know it was an evergreen classic hit, and still is, based upon the declaration of Steinar Berg Isleifsson, owner of the Iceland's largest record, the declaration of Andrea Jonsdottir, from the key² radio station Icelandic National State Radio. We also know that when Lovland flew over to Reykjavic, he would have flown on Icelandair, the major and dominant

² Unlike the US where in each major market there are too many radio stations to count, in Iceland and in most of Europe at the time, the amount of radio stations in each market or country was small enough⁴ to count on one hand.

1 national airline. If you flew to Iceland in the 1990s, you would have traveled via
2 Icelandair, and on Icelandair, an instrumental version of Soknudur was played on
3 Icelandair's boarding music and deplaning music. The music was played 15
4 minutes prior to boarding and 15 minutes after the plane landed, and Soknudur
5 being an evergreen was on the play list the entire time.

6 Soknudur was also played in Norway, the country where Rolf Lovland lived
7 and still lives. We know this from the Statement of Mr. Hjalti Arnason who ran a
8 radio station in Oslo, Norway. (Attached to Helgason Decl as Exhibit 10.)

9 **C. “You Raise Me Up” is released and heard by Johann Helgason**

10 Before Josh Groban released You Raise Me Up and had a massive worldwide
11 hit, Rolf Lovland released his band Secret Garden's version of it in 2001 or 2002.
12 Johann Helgason first heard You Raise Me UP in or about March 2004. He wrote to
13 STEF – the Icelandic Performing Rights Society on 23 March 2004. He asked
14 them to assess whether or not there had been a breach of copyright. STEF
15 conducted an analysis comparing “Soknudur” (the original version song by
16 Vilhjalmur Vilhjalmsson) to the Josh Groban version of “You Raise Me Up”
17 released in 2003. A copy of the analysis is attached to the Helgason Decl ¶ 19 and
18 Ex. 6) along with the English translation. STEF arranged for two musicologists to
19 prepare a “*Comparative Assessment dated 3 May 2004*” They noted “You Raise
20 Me Up” strikingly resembled Soknudur, stating that 97% of You Raise Me Up’s
21 melodic material is related to Soknudur.”

22 STEF then wrote to TONO, the Norwegian Performing Rights Society of
23 which Rolf Lovland is a member. TONO did its own analysis and invented the
24 “Danny Boy³” defense.

25
26 _____
27 ³ “Danny Boy” is basically “Londonderry Air,” an instrumental song, put to
28 words. The experts agree upon this, and in this brief, sometimes the two songs
are used interchangeably. 5

1

2 **D. The Invention of the “Danny Boy” Defense**

3

4 The Danny Boy defense states that whatever similarities exist between
5 “Soknudur” and “You Raise Me Up” also exist in “Danny Boy” and therefore there
6 is no infringement. However, the “Danny Boy” defense ignores that there is far
7 more in common between “Soknudur” and “You Raise Me Up” then in either of the
8 songs in dispute alone and “Danny Boy.” Put differently, “You Raise Me Up”
9 sounds more like “Soknudur” than it does like “Danny Boy.”

10 Learning that TONO and Lovland would not voluntarily relinquish any claim
11 to the song “You Raise Me Up,” Johann Helgason arranged to file a suit in the
12 United Kingdom. However, for various reasons, primarily financing, Mr. Helgason
13 was unable to actually file a lawsuit. Still Mr. Helgason was not deterred, and the
14 fight carried on in the press, but not in court.

15 Then many years later, in 2018, Mr. Helgason met his current counsel
16 through an Icelandic friend of an Icelandic friend who had done business with Mr.
17 Machat. At long last justice would be sought, this time in the US as opposed to
18 England, and STEF, the Icelandic Performing Rights Society agreed to front the
19 costs.

20 Mr. Helgason, transferred the song rights to plaintiff and a suit was
21 commenced. Defendants answered and hired a musicologist, Lawrence Ferrara,
22 who likewise brought up the Danny Boy defense. Plaintiff in turn hired a US
23 based musicologist, Judith Finell, who sharply criticized the expert report prepared
24 by defendants’ expert and rendered her own opinion, finding that the songs are
25 substantially similar. She, also like musicologists employed by STEF found that
26 none of the prior art referenced in the Ferrara report is more similar to “Soknudur”
27 and “You Raise Me Up” as the songs at issue are to each other. (Finell Report ¶
28

1 23) Dr. Finell states, "the existence of "Londonderry Air" by no means determines
2 that "You Raise Me Up" was created independently. (Finell Report ¶ 23d) Judith
3 Finell also opines, "*Lawrence Ferrara uses rigidly narrow criteria in comparing*
4 *"Soknudur" with "Raise," yet adopts vastly more flexible criteria in comparing*
5 *prior art to the two works at issue. This contradiction misleads the reader and*
6 *results in false and unreliable conclusions.*" (Finell Report ¶ 17)

7 Thus a material factual dispute exists which requires that defendants' motion
8 for summary judgment be denied.

9
10 **III. LEGAL STANDARD**

11
12 **A. STANDARD OF REVIEW FOR SUMMARY JUDGMENT**

13 Summary judgment is only appropriate when "the movant shows that
14 there is no genuine dispute as to any material fact and the movant is entitled to
15 judgment as a matter of law." Fed. R. Civ. P. 56(a). "The moving party has the
16 burden of establishing the absence of a genuine dispute of material fact." *City of*
17 *Pomona v. SQM N Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014) All
18 inferences drawn from the underlying facts "must be viewed in the light most
19 favorable to the party opposing the motion." *Matsushita Elec. Indus. Ltd v.*
20 *Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). Only admissible evidence may be
21 considered in connection with a motion for summary judgment. Fed.R. Civ. P.
22 56(e). However, in considering such a motion, a court is not to make any credibility
23 determinations or weigh conflicting evidence. All inferences are to be drawn in the
24 light most favorable to the nonmoving party. *See T.W. Elec. Serv., Inc. v. Pac. Elec.*
25 *Contractors Ass'n*, 809 F.2d 626, 630- 31 (9th Cir. 1987). Conclusory, speculative
26 testimony in declarations or other evidentiary materials is insufficient to raise
27 genuine issues of fact and defeat summary judgment. *See Thornhill*

1 *Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

2

3 **B. Copyright Infringement: Inquiry on Motion for Summary**

4 **Judgment**

5 To establish copyright infringement, two matters must be established: “(1)

6 ownership of a valid copyright, and (2) copying of constituent elements of the

7 work that are original.” *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S.

8 340, 361 (1991). “Because direct evidence of copying is not available in most

9 cases, [a] plaintiff may establish copying by showing that defendant had access

10 to plaintiff's work and that the two works are ‘substantially similar’ in idea and

11 in expression of the idea.” *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996).

12 Defendants do not dispute Rolf Lovland had access to the relevant works.

13 Further, for purposes of this Motion, they do not contest Plaintiff's ownership of

14 valid copyrights in “Soknudur⁴” Therefore, at issue is substantial similarity.

15 A motion for summary judgment in a copyright infringement suit

16 necessarily fails when there is “a genuine issue regarding whether the ideas and

17 expressive elements of the works are substantially similar.” *Brown Bag Software*

18 *v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir. 1992). “A ‘genuine issue’ exists

19 when the plaintiff provides indicia of ‘a sufficient disagreement’ concerning the

20 substantial similarity of two works ‘to require submission to a jury.’” *Id.* (citations

21 omitted). In determining whether two works are substantially similar, the Ninth

22 Circuit employs a two-part analysis: “an objective extrinsic test and a subjective

23 intrinsic test. For the purposes of summary judgment, only the extrinsic test is

24 important because the subjective question whether works are intrinsically similar

25 must be left to the jury.” *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004), *as*

26 *amended on denial of reh'g* (Aug. 24, 2004).

27

28 ⁴ A copyright registration for the work recently issued. (Machat Decl Ex. 1)

1 In general, in applying the extrinsic test, a court considers expert testimony
2 in order to perform what is called “analytical dissection” of a work. “‘Analytical
3 dissection’ requires breaking the works ‘down into their constituent elements, and
4 comparing those elements for proof of copying as measured by substantial
5 similarity.’ Because the requirement is one of substantial similarity to protected
6 elements of the copyrighted work, it is essential to distinguish between the
7 protected and unprotected material in a plaintiff’s work.” *Swirsky*, 376 F.3d at 845
8 (citations omitted). “To the extent a plaintiff’s work is unprotected or
9 unprotectable under copyright, the scope of the copyright must be limited” prior to
10 conducting this analysis. *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465,
11 1476 (9th Cir. 1992) (quotation marks omitted). However, “[a]lthough copyright
12 protection is not afforded to certain elements of a work, such *limitations must not*
13 *obscure the general proposition that copyright may inhere, under appropriate*
14 *circumstances, in the selection and arrangement of unprotected components.*” *Id.*
15 at 1476 n.4 (quotation marks omitted).

IV. ARGUMENT

A. THE SONGS “SOKNUDUR” AND “YOU RAISE ME UP” ARE SUBSTANTIALLY SIMILAR

20 To rebut defendants' motion for summary judgment and to prove substantial
21 similarity, Plaintiff engaged the services of musicologist Judith Finell. Recently,
22 Ms. Finell was honored to be the 2018 commencement speaker at UCLA's Herb
23 Albert School of Music. She was also interviewed by NBC/Universal
24 for a 2018 documentary entitled "The Universality of Music," in which she
25 discussed the ways in which she sees music as being an international language
26 that can bridge cultural barriers that spoken language does not.

27 | Judith Finell was the testifying expert for the Marvin Gaye family in the

1 milestone “Blurred Lines” case in Federal Court. She has testified in many other
2 notable copyright infringement trials over the past 20 years. Ms. Finell has been
3 invited to teach the first course in the country on forensic musicology at UCLA this
4 year. She holds an M.A. degree in musicology from the University of California at
5 Berkeley and a B.A. from UCLA in piano performance. She has written numerous
6 articles and a book in the area of contemporary music and copyright infringement
7 and has appeared in trials on Court TV and before the American Intellectual
8 Property Law Association. She is a trustee of the Copyright Society of the U.S.A.,
9 and has appeared as a guest lecturer at the law schools of Harvard University,
10 UCLA, Stanford, Columbia, Vanderbilt, George Washington, NYU, and Fordham.
11 A copy of her resume is attached to the Machat Decl. Ex. 7.

12 Ms. Finell prepared two reports for Plaintiff. In her first report,
13 commissioned prior to defendants filing of its motion for summary judgment, she
14 concludes decisively that the two songs at issue are substantially similar. After
15 defendants filed their motion for summary judgment, Ms. Finell was asked to
16 review defendants’ musicologist report. Ms. Finell then submitted a rebuttal
17 report. Both reports are attached to the Machat Decl as Exhibits 3 – 6.

18 Also, as part of Ms. Finell’s first report, she submitted two powerpoint
19 exhibits that feature links where once clicked play music to demonstrate the points
20 she makes in her report. These powerpoint files are being submitted to the Court
21 separately in a CD.⁵

22 Ms. Finell compared the first release of Soknudur, the 1977 release song by
23 Vilhjalmur Vilhjalmsson with the first release of You Raise Me Up by Secret
24 Garden. Defendants’ expert Mr. Ferrara states in his report that the Secret Garden
25 version of “You Raise Me Up” is essentially the same as the Josh Groban version.
26

27 ⁵ The exhibits will also be uploaded onto Pacer as pdfs but turning the pptx files into pdfs will flatten the file and
28 the music will not be able to be heard.

1 (Ferrara Report ¶ 9).

2 Ms. Finell summarizes her findings as follows:

3 “Söknuður” (“Soknudur”) and “You Raise Me Up” (“Raise”) are
4 substantially similar in their melodic pitches due to the shared use of the
5 same underlying skeletal pitches. The two components of melody are pitch
6 plus rhythm (duration of pitches), so when two melodies contain a lengthy
7 sequence of their primary and some secondary pitches, they normally sound
8 alike. In the case of “Soknudur” and “Raise,” these similar pitches occupy an
9 unusually long series of consecutive measures and phrases, as shown in the
10 attached Musical Exhibit A.

11 Footnote 1 of her report explains,

12 “The term ‘skeletal pitch’ is used in this report to describe a series of
13 pitches that serve as the ‘core’ of the underlying melody, namely the melodic
14 ‘backbone’ of the song. In this case, each song has a very similar skeletal
15 pitch series, meaning they share a significant number of the same consecutive
16 melodic pitches, forming the melodic identify of both “Soknudur” and
17 “Raise.”

18 Ms. Finell also opines,

19 “In addition to the similar series of phrases, both works share a
20 structure in the way that they progress in a series of musical “events,” as
21 illustrated in Exhibit B attached. It is this combination of the sequential use
22 of many of the same pitches and musical “events” that result in the two
23 works being substantially similar, despite some differences in musical details
24 and secondary traits.

25 6. There are substantial similarities between these works in their
26 melodic and other musical features, particularly of the underlying melodic
27 theme, which is referred to as “Skeletal Pitches” in the below

1 report.

2 a. Exhibit A demonstrates how the underlying melodic theme (skeletal
3 pitches) is found in both “Soknudur” and “Raise.”

5 b. Exhibit B demonstrates that both “Soknudur” and “Raise” share the
6 same underlying structure and fundamental musical “events” for nearly half
7 of each song.

9 7. 32 of the 78 total bars in “Soknudur” (in the recording provided)
10 are also found in substantially similar material in “Raise.”

11 8. Importantly, in both “Soknudur” and “Raise,” the verse contains the
12 main musical content, and this verse shares the same skeletal pitch series.
13 (Please see Exhibits A and B.)

14 The copyright registration attached to the Machat Decl satisfies the first
15 requirement to prove a copyright claim. Defendants do not contest access, the first
16 part of the second requirement to prove a copyright claim. Judith Finell’s expert
17 report satisfies the substantial similarity requirement to establish copyright
18 infringement. (Ms. Finell’s expert report also corroborates the report from STEF,
19 the Icelandic Performing Rights Society prepared by two musicologists.) Therefore,
20 Plaintiff have established a bona-fide case of copyright infringement.

21 As a defense to copyright infringement, defendants raise the Danny Boy
22 defense while also claiming a lack of substantial similarity. However, not only is
23 their claim of prior art not applicable in this case, their expert’s manner of
24 attacking the obvious similarity of the two songs in dispute must lead one to ponder
25 the credibility of defendant’s expert witness Lawrence Ferrara.

26 **B. Lawrence Ferrara’s expert report is fundamentally flawed and not
27 credible.**

1 Despite his lofty credentials, Lawrence Ferrara's report is so faulty and self-
2 contradictory, it leads to erroneous conclusions. (Finell Rebuttal Report ¶6) His
3 report fails to even acknowledge the similarities that exist between the two songs at
4 issue and uses inconsistent comparison criteria that obscures the reality that
5 Soknudur and You Raise Me Up are more similar to each other than any prior art.
6 (Finell Rebuttal Report ¶6)

7 As Judith Finell notes,

8 “The Ferrara report employs the narrowest possible criteria in comparing
9 these melodies – insisting upon combined identical pitch, metric placement,
10 and rhythmic duration in each note. (Finell Rebuttal Report 10a.) Ms. Finell
11 uses a jazz version of “Happy Birthday” to make her point, explaining that a
12 jazz arrangement of “Happy Birthday” would normally retain the primary
13 pitches, lyrics, and character of the song, but may change the rhythms (often
14 to more syncopated ones) and some harmonies, and possibly add secondary
15 pitches to embellish the melody – all consistent with the jazz style. This
16 variation is accepted arrangement practice. Thus, in comparing two
17 arrangements of “Happy Birthday,” the pitches sung to the lyric “birthday”
18 could be the same in both arrangements, while the rhythms could be altered
19 somewhat, with the beginning syllable “birth-“ elongated rhythmically in the
20 jazz version so as to delay the metric placement of the ending syllable “-
21 day.” It would be grossly inaccurate to deny the similarity between these two
22 versions of “Happy Birthday.” (Finell Rebuttal Report ¶10a on pages 3-4)
23 His refusal to acknowledge substantial similarity robs Mr. Ferrara of any
24 credibility for the rest of his analysis.

25 Judith Finell continues:

26 “Ferrara’s faulty methodology distorts in denying many similar contiguous
27 notes, overlooking similar contiguous pitches as well as shared pitches that are
28

1 repeated in one of the songs, merely due to variations in metric placement. For
2 example, the pitches of a phrase that Lawrence Ferrara erroneously describes as
3 containing only three contiguous notes actually contains over double the similar
4 notes, as shown below.⁸ [LF ¶37.] Specifically, the same contiguous notes shown
5 in the Ferrara musical example [LF Musical Example 3, Bars 4-6, Phrase 3] are in
6 bold type below; while Lawrence Ferrara erroneously acknowledges only those
7 pitches that are underlined here:

8

- 9 1) “Soknudur”: **G-A-B-C-C-B-B-A-G-C** c. The above approach is
- 10 applied throughout the Ferrara report’s comparison of “Soknudur”
- 11 with “Raise,” minimizing the true scope of similarity that is actually
- 12 present.
- 13 2) “Raise”: **G-A-B-C-B-B-A-G-F-G-E**

14 In comparing the above melodic phrases, the first eight consecutive pitches in
15 “Raise” are found in the same sequence in “Soknudur,” with one repeat of the pitch
16 C. By focusing only on pitches with identical metric placement, the Ferrara report
17 misleads by mischaracterizing and minimizing the similarity here as having merely
18 three successive notes in common.

19 The above approach is applied throughout Ferrara report’s comparision of
20 “Soknudur” with “Raise,” minimizing the true scope of similarity that is actually
21 present. (Finell Rebuttal Report 10c)

22 In the diagram on page 16 below, copied from the Finell Rebuttal
23 Report, Judith Finell added vertical red lines to show the many shared pitches the
24 Ferrara report omits. The red lines here, combined with the Ferrara report’s arrows
25 (in black), indicate identical pitches that are found in succession in both songs. This
26 includes pitch sequences where any intervening pitches are immediate repeats of
27 the identical pitch, and those where¹⁴ there is a single intervening differing
28

1 pitch. (The lines usually connect the repeats with the closest rhythmic relationship.

2 As shown below, 46 out of 76 pitches (61%) in “Soknudur” are actually
3 found in “Raise,” as opposed to the Ferrara report which omits 26 of these notes.
4 Ferrara’s methodology evades the audible similarities between the melodies. The
5 similarities between the pitches throughout the melodies of both songs are obvious
6 and would be recognizable to the lay listener. (Finell Rebuttal Report 11.)

7 Ms. Finell further points out that not only does Ferrara fail to acknowledge
8 the similarities in the many shared pitches, but also he fails to acknowledge the
9 melodic and structural function of shared pitches that occur in succession, as well
10 as their (b) range (lowest and highest pitches), and (c) melodic contours. Finell
11 Rebuttal Report 12.)

12 Ms. Finell further notes that the section of the Ferrara report comparing the
13 harmonies of “Sooknudur” and “Raise”, Bars 1-8 (the verse sections of both songs)
14 were omitted in the comparison chart; however Bars 1-8 do have many similarities
15 in the harmonies as clarified in her comparison chart at page 8 of her report.

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

MUSICAL EXAMPLE 3
"Soknudur" Placed Over "You Raise Me Up"
Verse 1 and Chorus 1



Continuing on Ms. Finell notes, the Ferrara report focuses on irrelevant musical information unrelated to compositional copying here, to build an erroneous impression of dissimilarity. (Finell Rebuttal Report 15.)

While continuing to mislead by omitting numerous similarities, Lawrence Ferrara does admit, "All structural sections of 'Your Raise Me Up' embody the musical elements that appear in 'You Raise Me Up' and in 'Soknudur.' Here the Ferrara report confirms the extent to which the similar elements shared with "Soknudur" influence the identity of "Raise" as well as their qualitative significance. (Finell Rebuttal Report ¶16.)

C. Similarity in Lyrics

Although Plaintiff only seeks to recover for the copied music and not lyrics, Lawrence Ferrara refuses to concede any obvious similarity in the lyrical themes of the two songs in dispute. He clearly is wrong, and he is dissecting the lyrics of the songs so that there is no sense to be made of them. He claims there are

1 only a couple of instances of two words in common, but unlike music that has only
2 7 notes, there are countless number of words. So it makes no sense to compare the
3 actual words, particularly when one song is in Icelandic. Instead he fails to
4 acknowledge what the songs are about. As Johann Helgason says, in each song,

5 “the narrator is depressed and bemoans his spiritual state. In both songs, the
6 answer is the same: “Ef værir þú hjá mér...” (“If you were with me”) in one
7 case, and in the other: “Until you come . . .” In short, proximity to the loved
8 one is the only thing that can overcome the anguish. The same feeling of
9 loss, (Icelandic: *söknuður*) predominates.”

10 “Although the two choruses do not exactly parallel each other, there is no
11 denying that the thought reflected in the first verse of “Soknudur” reappears
12 in the chorus of “You Raise Me Up” “Nærvera þín fyllir mig löngun til að
13 verða betri en ég er í raun og veru” (English: Your proximity/closeness fills
14 me with a longing to be better than I really am: *Söknuður*). And in the case
15 of the other song: “I am strong, when I am on your shoulders; You raise me
16 up . . . to more than I can be” – *You Raise Me Up*. ”

17 Ferrara compares the words of the songs as a vintner might compare different
18 types of grapes, arguing that a merlot is absolutely different from a cabernet
19 sauvignon, but to the ordinary consumer, they are both red grapes used to make
20 similar tasting wines. Of course one can distinguish the two songs, but the themes
21 are similar just like a merlot grape is similar to a cabernet grape. Ferrara makes
22 sophist arguments because he is paid to do so.

23 **D. Prior art: the Ferrara report contradicts its own findings by
24 employing inconsistent comparison criteria, with conflicting
25 conclusions and misleading results.**

26 First, it should be noted that Danny Boy is essentially the same song as
27 Londonderry Air and Judith Finell considers them the same in her rebuttal

1 report. (Finell Rebuttal Report fn.13.)

2 Second, as Judith Finell writes,

3 “The Ferrara report omits significant differences in prior art. It fails to
4 acknowledge the critical difference in meter and metric placement of any similar
5 pitches. It disregards different rhythmic durations. (**Finell Rebuttal Report ¶¶ 18**
6 **and 19**)

7 Lawrence Ferrara deceptively claims There are more melodic similarities
8 between “Londonderry Air” or “Danny Boy” and “You Raise Me Up” or
9 “Soknudur” than between “Soknudur” and “You Raise Me Up.” **Ferrara Report**
10 **¶¶ 51-56, 58- 65, 107, 110.**

11 However as Ms. Finell points out, The Ferrara report fails to explain that in
12 comparing “Londonderry Air” with “Raise,” of the 28 notes that Ferrara
13 acknowledges as similar by connecting them with arrows, nine of these having
14 differing rhythmic durations. (**Finell Rebuttal Report pages 11 -15, ¶¶ 22**
15 **through 23(e).** The Ferrara report uses inconsistent comparison criteria leading to
16 misleading results. (**Finell Rebuttal Report ¶17**

17 Contrary to Ferrara, Judith Finell concludes that using consistent criteria,
18 53% of the melody’s 87 pitches in You Raise Me Up are shared successively with
19 “Soknudur.” She shows more shared pitches between “Soknudur” and “You Raise
20 Me Up” than between “Soknudur” and “Londonderry Air” and between “You Raise
21 Me Up” and “Londonderry Air.” **Finell Rebuttal Report ¶23.**

22 Ms. Finell critiques the so called “fingerprint” that is based on a shared high
23 note in “Londonderry Air” and “You Raise Me Up.” She notes, the criteria used
24 by Ferrara in order to determine similarity contradicts what he uses to compare
25 “Soknudur” and “You Raise Me Up.” The “high note” is an element related to the
26 melodic range in both songs, an element disregarded in the Ferrara report’s
27 comparison of “Soknudur” with “You Raise Me Up.” Additionally, the “high
28

1 note" does not meet the criteria of shared metric placement as strictly applied in
2 Ferrara's evaluation of the similarities between "Soknudur" and "You Raise Me
3 Up." Also, the high note occurs not only on a different beat in "Londonderry Air"
4 as compared to "You Raise Me Up," but actually in a different bar. She points out
5 this inconsistency distorts and misleads. *"More importantly, the Ferrara report
6 greatly mischaracterizes the significance of this similar note. A "fingerprint" -- as
7 a metaphor -- represents a unique characteristic that in the context of musical
8 expression suggests a shared rare singular feature departing from standard
9 musical practice. The note referred to in the Ferrara report is simply the
10 traditional third note of the scale (and part of the main tonic chord.) It is in no way
11 an unlikely creative choice representing a pitch deviation from the established
12 key."* Finell Rebuttal Report ¶23c.)

13 Ms. Finell also compared the harmonies between the three songs
14 (Londonderry, Raise and Soknudur) and concluded there are more chords in
15 common between "Soknudur" and "You Raise Me Up" than between either of these
16 songs and "Londonderry Air." Finell Rebuttal Report ¶23d. She ends up
17 concluding, the existence of "Londonderry Air" by no means determines that
18 "Raise" was created independently of "Soknudur." Finell Rebuttal Report ¶23e.)

19 There was even much less similarity with the songs in dispute and "When a
20 Child is Born." Judith Finell reports, 46 shared pitches between "Soknudur" and
21 "You Raise Me Up" but only 26 shared pitches between "Soknudur" and "When a
22 Child is Born" and only 21 shared pitches between "You Raise Me Up" and "When
23 a Child is Born." She also notes more chords in common between "Soknudur" and
24 "You Raise Me Up" than between either of these songs and "When a Child is
25 Born." She furthermore notes, "the lack of melodic similarity particularly in the
26 chorus sections redeems any shared chords here (which are in this case
27 commonplace) insignificant. Finell Rebuttal Report ¶24.

1 As for the remaining prior art examples, Ms. Finell writes,
2 “The Young Man’s Dream,” “Tis the Last Rose of Summer,” and “I Can’t
3 Forget,” none of them contain the degree of similarity in their melodies as
4 found between “Soknudur” and “Raise,” even using very lenient comparison
5 criteria. “The Young Man’s Dream” and “Tis the Last Rose of Summer” are
6 in 3/4 meter, and “I Can’t Forget” contains a combination of 3/4, 4/4, and 5/4
7 meters, which is vastly different from the verse and chorus sections at issue
8 in “Soknudur” and “Raise.” For the most part, the Ferrara report finds
9 melodic similarity with only one or two particular phrases in “Soknudur” and
10 “Raise” (most often Phrase 3). Lawrence Ferrara focuses his melodic
11 comparisons of these examples on contour outside of a rhythmic context.
12 Finally, the Ferrara report lacks a quantitative analysis of any similarities
13 between these examples as compared to “Soknudur” and “Raise.”

14

15 V. CONCLUSION

16 Defendants’ expert report is based upon a flawed methodology and
17 inconsistently applied criteria. It fails to disprove the obvious similarity between
18 “Soknudur” and “You Raise Me Up.” Furthermore, none of the prior art identified
19 is as similar as “Soknudur” and “You Raise Me Up” are to another. “Soknudur”
20 and “You Raise Me Up” are substantially similar. Defendants motion for Summary
21 Judgment should be denied.

22 Respectfully submitted,

23 MACHAT & ASSOCIATES, P.C.

24 Dated: September 13, 2019

25 By: Michael Machat

26 Michael Machat, Esq.

27 Attorney for Plaintiff
JohannSongs – Publishing, Ltd